

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 04-0274P**

**Use Tax**

**For Tax Years 1999-2000**

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**ISSUE**

**I. Tax Administration—Negligence Penalty**

**Authority:** IC 6-2.5-1-8; IC 6-2.5-4-1; IC 6-2.5-6-10; IC 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests imposition of a ten percent (10%) negligence penalty.

**STATEMENT OF FACTS**

As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments of use taxes for 1999 and 2000. Taxpayer paid amounts equal to the assessments, but protested the imposition of a ten percent negligence penalty. Further facts will be provided as necessary.

**I. Tax Administration—Negligence Penalty**

**DISCUSSION**

Taxpayer's business consists of data processing, data storage, and administration of data systems and billing systems for telephone companies. Taxpayer protests the imposition of a ten percent negligence penalty on assessments for tax years 1999 and 2000. The Department imposed the negligence penalty due to underpayment of use tax for the years in question, as provided in IC 6-8.1-10-2.1. As the result of an audit, the Department determined that taxpayer was taking a one percent (1%) collection fee from use tax payments it made to Indiana. Also, the Department determined that a one percent collection fee is allowed for sales tax but not use tax, and taxpayer was therefore not entitled to the collection fee on its use tax payments.

Taxpayer paid an amount equal to the underlying assessments, but did not pay an amount equal to the penalties. Taxpayer states in its protest that it paid sales tax and use tax consistently and timely during the audit period and was unaware that any sales tax or use tax had been omitted.

Taxpayer also points out that the amount in question is a small fraction of its overall tax payments, most of which were properly paid.

The relevant statute is IC 6-2.5-6-10(a), which states:

- (a) In order to compensate retail merchants for collecting and timely remitting the state gross retail tax and the state use tax, every retail merchant, except a retail merchant referred to in subsection (c), is entitled to deduct and retain from the amount of those taxes otherwise required to be remitted under IC 6-2.5-7-5 or under this chapter, if timely remitted, a retail merchant's collection allowance.

IC 6-2.5-1-8 states:

"Retail merchant" means a person who is described as a retail merchant in IC 6-2.5-4 or who is required to hold a retail merchant's certificate under IC 6-2.5-8.

IC 6-2.5-4-1(b) explains:

A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:

- (1) acquires tangible personal property for the purpose of resale; and
- (2) transfers that property to another person for consideration.

Since taxpayer's business is data processing, data storage, and administration of data systems and billing systems for telephone companies it is not acquiring tangible personal property for the purpose of resale and so is not a retail merchant making a retail transaction under IC 6-2.5-4-1(b). Therefore, taxpayer is not a retail merchant under IC 6-2.5-1-8, and is not permitted to use the retail merchant's collection allowance described in IC 6-2.5-6-10(a).

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

Also, 45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to

reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

Since taxpayer was not permitted the collection allowance under IC 6-2.5-6-10, the amount of use tax it remitted to the State was incorrect. Therefore, taxpayer did not exercise such reasonable care, caution or diligence as would be expected of an ordinary reasonable taxpayer. Under 45 IAC 15-11-2(b), this is negligence.

### **FINDING**

Taxpayer's protest is denied.

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